***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

74-1201

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IN THE

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 74-1201

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USAchem, INC.,

Plaintiff-Appellant,

vs.

HOWARD A. GOLDSTEIN and HOWARD A. GOLDSTEIN d/b/a GOLD SEAL ASSOCIATES,

Defendant-Appellee.

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On Appeal from the United States District Court
for the Western District of New York

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# APPELLEE'S MEMORANDUM OF LAW

(Brief)

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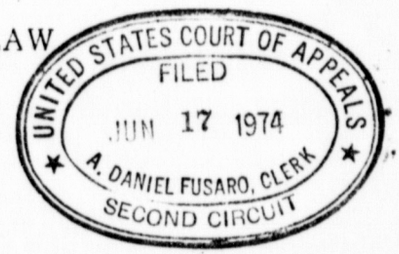


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# APPELLEE'S MEMORANDUM OF LAW

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## Questions Presented

1. Did the Court below err in denying defendant's motions to dismiss plaintiff's complaint for want of jurisdictional amount?

2. Is the provision in plaintiff's profit-sharing plan providing forfeiture of an employee's vested interest in the event of post-employment competition void as against public policy?

3. Did the Court below err in dismissing defendant's counterclaim against plaintiff for wrongful conversion of defendant's interest in the employee profit sharing plan?

4. Did the Court below err in granting judgment in favor of plaintiff against defendant as a matter of law in the amount of $3,386?

5. Is the eighteen-month post-employment restriction which is part of the sales representative's agreement here void and in violation of public policy?

## STATEMENT OF FACTS

In April, 1963, Howard A. Goldstein (Goldstein), then 27 years of age sought employment as a salesman with the plaintiff corporation. On or about the 19th day of April, 1963, Goldstein visited with the regional headquarters of the corporation in New York City for a job interview. (p. 212). There he was approved for hiring and signed a printed form styled "sales representative's agreement." (Plaintiff's Exhibit 1). The document had twelve numbered paragraphs containing, among other things, a provision purporting to restrict Goldstein for a period of eighteen months following his termination of employment with the corporation or for a period of eighteen months from the date of a court order enforcing the restriction, from selling janitorial and maintenance supplies in the territory assigned to him by the corporation. (p. 18) At trial, plaintiff's vice-president, Kimmel, stated that he spent ten to fifteen minutes explaining the form to Goldstein prior to his signing it (p. 271), although Goldstein stated that the purported re-

strictions were never mentioned at all in the course of his conversation with Kimmel. (p. 294)

Kimmel, who had no legal training or background in contracts (p. 272) stated at trial that all persons employed by the corporation signed the same form (p. 267-68) containing the same purported restrictions (p. 267-68); that he had no authority to vary a single term on the printed form (p. 273-75) and; a man could not work for the corporation until the form was signed. (p. 14) Kimmel admits that he did not fully explain to Goldstein the post-employment restrictions. (p. 294) During the course of testimony it was also brought out that the corporation presently employed approximately 1,000 salesmen in the United States (p. 9) who signed identical forms containing the same restrictions. (p. 267-68)

The form also provided, among other things, that: employment could be terminated at any time by either party without notice (Plaintiff's Exhibit 1¶9); that Goldstein would receive a commission in accordance with a company commission schedule (Id. ¶1) and; that the purported agreement would be governed by the laws of the State of Texas (Id. ¶11). The signatories to the form were Goldstein and National Chemsearch Corporation of New York, predecessor in interest to plaintiff corporation. The contract was executed and to be performed within the State of New York.

Shortly after the April 19, 1963 interview in New York City, Goldstein was sent to Cape Cod for some instruction by another of the corporation's salesmen, where he spent four days. (p. 229) Thereafter, he returned to Rochester and was given the names of some 20 people previously sold by the corporation. (p. 163) He was then visited for four days by Kimmel, then his sales manager (p. 229), who instructed him on the basics of selling. A similar visit was made by Kimmel 30

and 60 days after Goldstein's start in his territory. (p. 232-233)

Nothing but the basic rudiments of selling were ever imparted to Goldstein by the corporation. (p. 354) He was never given any confidential information (p. 224-28, 356), product secrets, secret formulations (p. 306) or patent information (p. 308). The products sold by Goldstein for the corporation were not novel or unique by the corporation's own admission. (p. 304-06)

Although Goldstein was given the names of 20 potential buyers for the corporation's products, there were literally thousands of potential customers within Goldstein's territory. (p. 11) In fact, the corporation's treasurer stated that everyone except the home purchaser was a potential customer for its products (p. 60, 84) and that the company had penetrated less than 5% of its potential market. (p. 60-61) Nor were the identities of all the potential customers confidential, as they were readily identifiable from their listings in the telephone directory. (p. 316)

The corporation has thousands of competitors selling identical products, (p. 11, 60) In fact, the corporation itself added to this competition by selling identical products under other trade names through additional salesmen in Goldstein's territory. (p. 64-66, 265-66) At the time Goldstein terminated employment with the corporation he was selling the corporation's products to approximately 200-250 customers. (p. 286)

In 1964, Goldstein became eligible for and did begin to participate in the corporation's employee profit-sharing plan (Defendant's Exhibit 2), which plan was explained to him as a company benefit at his employment interview on April 19, 1963. (p. 124-25, 215, 300, Plaintift's Exhibit 6) Under the plan, certain profits of the corporation were set aside for the benefit of employees. All decisions under the plan were made by the profit sharing committee whose members were all employees

and shareholders of the corporation (p. 27) appointed by the corporation. Among the other provisions of the plan, it was provided that if an employee, in the judgment of the committee, directly or indirectly competed with the corporation, he would forfeit his interest in the plan (Defendant's Exhibit 2¶12.3); any such forfeitures going back to the plan. (p. 82)

At the trial, the corporation made repeated and unequivocal statements that the purpose of both the restrictive provision in the sales representative agreement and the forfeiture provision in the profit sharing plan was to protect the corporation against competition. (p. 28, 116-18, 127) Indeed, the two provisions were explicitly designed to compliment each other in obtaining the single objective of protection of the corporation from competition. (p. 117-18) An extra measure of assurance was lent to this objective in that, unlike the sales-representative provision purporting to restrict competition for a period of eighteen months following termination, the profit-sharing forfeiture provision restricted the employee for the rest of his life, and throughout the entire world. (p. 148, 150)

During the year, 1970, Goldstein was operated on for a gall bladder problem and was unable to sell plaintiff's products for a period of several months. (p. 168) In that period of time, the corporation continued to send Goldstein weekly draw checks against which he earned no commissions due to his illness. (p. 171) Yet, the corporation never asked Goldstein to repay the amounts by which his draws exceeded his commissions earned; he was told that the advances were merely bookkeeping entries on his monthly commission statements. (p. 352, 359-60) After another period of illness in 1972, in which Goldstein was again physically incapacitated for several months due to a cardiac problem, his draws again exceeded his commissions earned. Then, also, he was

never told he had to repay any such draws. (p. 332, 352, 359-60) He did, however, voluntarily, return the last two draw checks he received, just prior to termination with the corporation, totaling $500.00. (p. 334-35)

On or about August 25, 1972 Goldstein informed Kimmel that he was terminating his employment with the corporation. (p. 403) A few days later he began selling janitorial and maintenance supplies to his former customers. Approximately one month later, the corporation hired a new salesman with no prior experience (p. 319) to replace Goldstein in his former assigned territory. (p. 55, 99-100, 263) Within a few months the replacement man was selling at a rate almost equal to and at times exceeding Goldstein's sales. (p. 101, 111) The replacement sought to sell and did sell many of the same people formerly sold to by Goldstein while employed by the corporation. (p. 203) On October 3, 1973, one year after he began, the replacement was selling to approximately 200 customers (Defendant's Exhibit 13 at p. 5). This was approximately as many customers as Goldstein had when he terminated employment with the corporation. After one year, an inexperienced salesman had achieved the same level of sales as Goldstein who had worked in the field for nine years.

An important part of the selling technique of the corporation was giving gifts and premiums to potential customers (p. 323, 143), which premiums were sold to the salesmen by one of plaintiff's corporate divisions, costing salesmen several dollars per item in some cases. (p. 326-27, 339) The giving away of such gifts was stressed as part of the salesman's training program. (p. 323) The other part of the salesman's success was attributable to his own hard work and intellegence (p. 67) and not because of any confidential information or special skills given to him by the corporation. Every day

was a new grind with little customer loyalty. (p. 189)

Also at the time Goldstein terminated employment with the corporation, his account in the corporation's profit-sharing plan stood at $6,580 (p. 81), 45% of which was vested (p. 81-82) -- except for the unlimited forfeiture provision. (p. 117) In February, 1973, action was taken by the profit-sharing committee which forfeited Goldstein's interest in the plan as of December 31, 1972 (p. 80) for alleged competition with the corporation despite the fact that Goldstein had demanded the return of his interest in the plan.

Upon advice of counsel that the purported restrictions were unenforceable and void as against public policy and that he had a right to work just as anyone else (p. 366-68), Goldstein continued to sell janitorial and maintenance supplies in the same area after he received letters of warning from counsel for corporation and after service of summons and complaint in the within action.

On March 12, 1973, the corporation moved for a preliminary injunction to enforce the purported restriction, which motion was denied by Hon. Harold P. Burke who found that "there is no showing that the plaintiff will suffer irreparable damage if this court does not grant it a preliminary injunction." (January 31, 1973 Decision at page 3) On the same date Goldstein cross-moved to dismiss the complaint for lack of jurisdictional amount, which motion was denied.

Goldstein continued to sell janitorial and maintenance supplies in the same area up to the time of trial. During this entire period of time the replacement man hired by the corporation to work in Goldstein's former assigned territory continued to successfully sell the corporation's products both to customers formerly sold by Goldstein when

employed by the corporation and to new customers. (Defendant's Exhibit 13) At the close of the evidence at trial the court: denied Goldstein's motion to dismiss for want of the jurisdictional amount; ruled that the corporation was entitled to recover, as a matter of law, the excess of draws over commissions at the time Goldstein terminated his employment notwithstanding the ambiguity of the agreement on this point, the course of dealing to the contrary between the parties, the failure of the corporation to make any prior demands for return of the said draws, and the repeated assurances by Kimmel that these draws were mere bookkeeping entries (p. 418); denied the request of Goldstein to charge the doctrine of mitigation of damages (p. 421); and dismissed Goldstein's counterclaim to recover his interest in his profit sharing plan. (p. 422-24)

The court then charged the jury that the provisions of the sales representatives agreement relating to post-employment competition were not in violation of public policy, were reasonable in time and scope and were valid and enforceable. (p. 430) The jury was then given the question of the amount of lost profits, if any, sustained by the corporation by reason of Goldstein (p. 431),reserving decision on the issue of injunction as a matter of law. The jury returned a verdict that no lost profits were incurred by the corporation (p. 435), whereupon Goldstein immediately renewed his motion to dismiss for want of the jurisdictional amount, which the court again denied. (p. 436) Thereafter, on January 10, 1974, the court denied the corporation's application for a permanent injunction finding that "There is no reasonable probability that the plaintiff will sustain damages during a period of 18 months following the entry of judgment. ... [T]here is no reasonable probability that the defendant will in the future divulge to others or use for his own benefit any confidential information acquired

during the course of his employment relating to sales, processes, or formulas." (Decision at 1-2) All of the above decisions and rulings were ostensibly based on the application of New York law. (p. 283)

I

THE BURDEN OF PROVING THAT THE REQUISITE JURISDICTIONAL AMOUNT CLEARLY EXISTS IS UPON THE PLAINTIFF

It is well settled that the burden of demonstrating that the amount in controversy exceeds $10,000.00 is upon the plaintiff, McNutt v. General Motors Acceptance Corp., 298 US 178 (1936); 1 Moore's Federal Practice ¶0.92(3.-1) (1960 ed.). This principle applies regardless of how the issue is raised; whether by defendant or by the Court on its own motion. Id. Moreover, the standard of proof applicable is that the jurisdictional basis be "clearly established." Fratto v. Northern Ins. Co., 242 F. Supp. 262 (W. D. Pa. 1965); see Thomson v. Gaskell, 315 US 442 (1941).

II

THE ISSUE OF LACK OF SUBJECT MATTER JURISDICTION CAN BE RAISED AT ANY TIME

FRCP 12(h)(3) provides that "whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action." The purpose of

the above provision is made clear by a reading of the Advisory Committee's Note to the amended Rule 12(h)(3), which provides in part

> "It is to be noted that while the defenses specified in subdivision (h)(1) are subject to waiver as they are provided, the more substantial defenses of failure to state a claim upon which relief can be granted, failure to join a party indispensable under Rule 19, and failure to state a legal defense to a claim ..., as well as the defense of lack of jurisdiction over the subject matter ..., are expressly preserved against waiver by amended subdivision (h)(2) and (3)."

That the above would permit a motion to dismiss for want of subject matter jurisdiction at any stage of the proceeding is borne out by such cases as United States v. Jacksonville Terminal Co., 351 F. Supp 452 (M.D. Fla. 1972) (trial court must entertain and consider a motion challenging jurisdiction although made long after trial and remand from Court of Appeals); In re National Bank & Trust Co., 287 F. Supp. 431 (E.D. Pa. 1968) (a motion to dismiss for lack of subject matter jurisdiction can never be waived and can be interposed at any stage of the action); Sobell v. Attorney General of the United States, 285 F. Supp. 958 (MD. Pa.), aff'd., 400 F. 2d 986 (3rd Cir.), cert. denied, 89 S. Ct. 302 (1968) (jurisdiction questioned for the first time after transfer of the case); Amundson v. United States, 279 F. Supp. 779 (SDNY 1967); Lian Bros. V. United States, 123 F Supp. 20, aff'd., 220 F. 2d 351 (2d Cir. 1955); Hacker v. Guaranty Trust Co., 117 F 2d 95 (2d Cir. 1941). It would be contrary to the policy of the Federal Rules to refuse to entertain defendant's motion to dismiss at this point; the issue of lack of jurisdictional amount is always properly before the court, even after a trial on the merits. United States v. Jacksonville Terminal, supra.

In Massachusetts State Pharmaceutical Ass'n. v. Federal

Prescription Service, Inc., 431 F. 2d 130 (8th Cir. 1970), the plaintiffs appealed from a dismissal of their complaint for injunctive relief on the grounds that the court lacked jurisdiction by reason of plaintiff's failure to establish the existence of the required $10,000.00 jurisdictional amount. In the answer the defendants raise as a defense lack of jurisdictional amount, but the trial court postponed ruling on the jurisdictional issue until after a hearing on the merits. After a trial on the merits the court dismissed for want of the jurisdictional amount finding that plaintiffs failed to establish that anyone of the plaintiffs had established an interest of $10,000.00 which was affirmed by the Court of Appeals.

In the very first paragraph of his Answer, defendant specifically denied knowledge and information sufficient to form a belief as to the truth of plaintiff's allegation of the existence of the requisite jurisdictional amount. From that point on defendant raised the issue of lack of jurisdiction at every step of the proceeding: by pretrial motion to dismiss; by reserving a trial motion after plaintiff's proof (p. 345); trial motion after the close of proof (p. 416); post-trial motion after jury found no damages had been suffered by plaintiff. (p. 436) It is therefore respectfully submitted that the issue of subject matter jurisdiction has not been waived, is preserved, and is properly before this Court.

III

THE REQUISITE JURISDICTIONAL AMOUNT IS WANTING SINCE THE TOTAL VALUE OF BUSINESS ALLEGEDLY ENTITLED TO PROTECTION IS LESS THAN $10,000.00

The Court's jurisdiction in this diversity action is based on Title 28 U. S. C. 1332(a) (1972). That section provides:

"The District Court shall have original jurisdiction of all civil actions where the matter in controversy

> exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between -- (1) citizens of different states...."

In an action seeking to protect a plaintiff's business or its good will, the jurisdictional amount is measured by determining the value of the endangered good will. Federated Mutual Implement & Hardware Co. Inc., v. Steinheider, 268 F. 2d 734 (8th Cir. 1959); Fuge v. Trantina, 422 F. 2d 1070, 1073 (8th Cir. 1970); 1J. Moore, Federal Practice ¶0.96(2) (1972).

The identical question was given a thorough treatment in Zep Manufacturing Corp. v. Haber, 202 F. Supp. 847 (SD Tex. 1962). In that case, plaintiff, like the plaintiff here, was a manufacturer and distributor of maintenance and janitorial supplies. Defendant was under contract to plaintiff as a salesman and sales supervisor. The contract of employment contained a restrictive covenant not to compete with plaintiff in a specified area for one year after termination of employment. Defendant terminated his employment and began selling for another company in competition with plaintiff.

Plaintiff sought a preliminary injunction alleging diversity jurisdiction. Defendant moved to dismiss for lack of jurisdiction. The Court found that it lacked jurisdiction in that it was not shown that there was $10,000.00 in controversy despite allegations to the contrary by plaintiff in its Complaint.

The Court first discussed the general principles applied to determine the amount in controversy in a suit to enforce a restrictive covenant:

> "In a suit for an injunction, the amount in controversy is determined by the value of the object to be

gained by the plaintiff. Glenwood Light & Water Co., v. Mutual Light, Heat & Power Co., 239 U. S. 121, 36 S. Ct. 30, 60 L. Ed. 174 (1915). In terms promulgated by this circuit, 'jurisdiction is to be tested by the value of the right sought to be protected against interference.' Seaboard Finance Co. v. Martin, 244 F. 2d 329 (5th Cir. 1957). Although some courts have held that the amount in controversy is the benefit to the plaintiff from the injunction, or the cost to the defendant of complying with it, whichever is greater (see e.g., Ronzio v. Denver & R. G. W. R. Co., 116 F. 2d 604, 606 (10th Cir. 1940), 'the more recent opinions, as a group, reflect the plaintiff-viewpoint concept in determining jurisdictional amount.' 1 Moore's Federal Practice 869, 870 (1960 Ed.). Thus, in resolving the dispute engendered by the defendant's challenge to plaintiff's allegations of jurisdictional amount, it is necessary to determine the benefit to the plaintiff from the injunction sought." 202 F. Supp. at 848.

The Court then dealt with the actual figures as follows:

"The testimony of Hubert Jenkins -- Zep regional division manager and defendant's immediate superior while in the employ of plaintiff -- was uncontroverted that defendant's sales for 1961 were approximately $115,000, and that defendant received approximately $33,000 therefrom. (The affidavit of Jenkins attached to the complaint establish these figures more precisely at $114,640 and $32,960, respectively.) Jenkins testified on cross examination that plaintiff's profit on defendant's sales, in Jenkin's estimation, was 10% of the amount paid to defendant -- approximately $3,300. Both parties have accepted this estimate in their briefs, and the issue is joined concerning whether the $3,300 is per se representative of the benefit to the plaintiff sought to be protected by the requested injunction, as argued by the defendant; or whether the value to the plaintiff of avoiding competition by defendant is the amount of a hypothetical investment which would produce an annual return of $3,300.

> Applying the plaintiff-viewpoint concept, defendant's 1961 income of approximately $33,000 is a neutral fact. Plaintiff's gross income of approximately $115,000 from defendant's 1961 sales is also a neutral fact insofar as it does not reflect true benefit to the plaintiff from defendant's services. See Basic Food Sales Corporation v. Mover, 55 F. Supp. 449 (D. C. W. D. Pa. 1944). See also S. S. Kresge Co. v. Amsler, 99 F. 2d 503 (8th Cir. 1938). At best, the estimated profit of $3,300 derived from defendant's 1961 sales is only an analogous basis for determining the value to plaintiff of an injunction prohibiting defendant's competition with plaintiff during a year of uncertain business activity. If, other factors remaining equal, it could be forecast that defendant would siphon off all the business he had generated or sustained for plaintiff during 1961, then it could be said that plaintiff would stand to lose an estimated $3,300 in profits if defendant is not restrained. Even if defendant were able to generate new business in the area allegedly covered by the covenant, which business would likely accrue to plaintiff but for defendant's activities in behalf of Titan Chemical Corporation, there is no indication that plaintiff's lost profits would amount to more than $10,000.00. To do so would entail a business increase of more than 200%. Nevertheless, the plaintiff has suggested no other basis for calculating the benefit to be dervied from an injunction, such as the protection of good will. As such, this court is constrained to look to the estimated $3,300 net profit from defendant's 1961 sales in extrapolating the probable value of an injunction to plaintiff." 20 F. Supp. at 848-49.

The above analysis finds support in Massachusetts State Pharmaceutical Ass'n. v. Federal Prescription Service, Inc., , supra. There the Court of Appeals held that the

> "amount in controversy is tested by the value of the suit's intended benefit to the plaintiff. In a suit involving unfair or unlawful competition the benefit to the plaintiff is generally measured by determining the difference between the value of plaintiff's business without the unfair or unlawful competition and the value of the business with

> it. If the unfair or unlawful competition diminishes the value of the plaintiff's business by more than $10,000.00 then the benefit to the plaintiff to prohibit this competition would meet the jurisdictional amount." Id. at 132. (citations omitted).

As in the above cases the amount in controversy here is the amount that plaintiff would profit on sales in the areas formerly served by defendant if defendant were barred from competing with plaintiff in those areas for a period of eighteen (18) months. Although plaintiff did plead a cause of action for punitive damages, this cause of action was explicitly dismissed by the court. (p. 416) The court also ruled that the cost of placement and training of a new salesman to replace defendant in his former assigned territory was not a proper item of damages because "either party had the right to terminate the employment at any time," and the expense was occasioned by defendant's "lawful termination of his employment." (p. 431) Furthermore, the jury found that plaintiff had suffered no lost profits as a result of alleged violation of the sales representatives agreement. The only item of damage found was $3,386 in draws, which the court decided as a matter of law. As pointed out above, a post-verdict examination into the requisite jurisdictional amount is proper. In view of the foregoing, defendant offers the following analysis based on the Zep Manufacturing Corp. case and others, for calculating the cost to plaintiff of defendant's alleged violation of plaintiff's restrictive covenant.

The amount of injury suffered by plaintiff is at most the difference between its after-tax profit on sales by: (1) a theoretical salesman who could operate in defendant's old territory free of competition from defendant; and (2) a salesman operating in competition with defendant. This would be in line with the generally recognized

principle of mitigation of damages. While the court refused to explicitly submit the issue of mitigation to the jury it is clear that mitigation naturally flowed from plaintiff's employment of a replacement salesman in defendant's former assigned territory. The court specifically permitted testimony regarding the replacements' employment and sales data. Authority is ample to support this as a proper consideration in an action for damages for breach of contract. 5-A. Corbin, Law of Contracts §1041 (1964); J. Fuchsberg, New York Law of Damages §7 (1965). See generally Mottla, New York Evidence §908 (1966).

In the usual case, for the first figure in the calculation the total average sales of a theoretical salesman operating in defendant's former territory free from competition from defendant must be found. In this case, there is no need to look to a theoretical salesman since there can be no better estimate of this figure than defendant Goldstein's actual average eighteen month sales in his former sales area prior to his termination of employment with plaintiff. Defendant's sales for the years 1970-72 were $57,831, $70.870 and $32,109 respectively. To find an eighteen month average for defendant, we take the three year total of $160,810 and divide by two, which equals $80,405. Conceding to the benefit of plaintiff that defendant's sales for these years may not be truly representative because of defendant's illness in 1970 and 72, we may round out the average eighteen month to $100,000. The second figure is what a salesman operating in competition with defendant would earn over the same eighteen month period. For this figure we must look to the replacement man hired by plaintiff to take over defendant's former assigned territory which man competed with defendant from the moment he was hired until the time of trial. According to the replacement man's commissions statements in evidence (Defendant's Exhibit 6, p. 112), his sales for the period October, 1972

to October 31, 1973 were approximately $65,000, while in competition with defendant. If the assumption can safely be made that the new man will gain experience and at least maintain his sales at past levels, it can be conservatively projected that his sales for an 18 month period in competition with defendant would be not less than $95,000.

Since plaintiff's damage is the difference between what a new salesman would do with and without competition from defendant, plaintiff's net profit after taxes arising out of sales by a salesman in competition with defendant must be subtracted from plaintiff's projected net profit absent competition. Based on the actual figures discussed above, to derive plaintiff's actual loss of gross revenues, we take the difference between the two gross sales figures:

$$\begin{array}{r} \$\ 100,000 \\ 95,000 \\ \hline 5,000 \end{array}$$

Therefore, $5,000 represents the projected loss of gross sales. But loss of gross sales is not plaintiff's measure of damages; rather, the relevant figure is plaintiff's projected loss of net profits. In plaintiff's 1972 Annual Report (Defendant's Exhibit 1, p. 61) plaintiff's net income after taxes as a percent of net sales is given as 9.6%. However, plaintiff's treasurer testified at trial that it earned approximately thirteen percent after tax on sales made by defendant in his former assigned territory. (p. 72-73) Conceding to the benefit of plaintiff that thirteen percent is the applicable figure to compute lost profits to find plaintiff's actual loss of net profits we multiply $5,000 x 13% which equals $650. Even aggregating the excess draw figure of $3,386 to come close to the $10,000 requirement plaintiff's lost sales would have to be in excess of $50,000, - a figure plaintiff has palpably failed to demonstrate throughout this proceeding. Hence, it is quite

clear that the jurisdictional amount cannot be satisfied by calculating plaintiff's loss of profits. It is important to note that this same standard was employed recently by the District Court of Illinois to dismiss the Complaint of the instant plaintiff for want of the jurisdictional amount under facts strikingly similar to the case at Bar. National Chemsearch Corporation v. Weinberg, Civ. No. 68-C-405 (N.D. Ill., June 27, 1968). (unreported).

If the lost profits cannot fulfill the jurisdictional requisite what else does plaintiff seek to gain by this suit? Is it plaintiff's good name; its secret customer list; the dominant market position it has managed to attain in defendant's territory. These factors, even if appropriate measures of the jurisdictional amount in general, have no application to this case. Plaintiff has testified that its name is not generally known, even to its customers (p. 60); the names of its customers and potential customers are readily available from an ordinary telephone book; (p. 316) it has less than a 5% share of its market (p. 60-61) with thousands of competitors (p. 11, 60) and; the replacement man in just 10-12 months has managed to sell to 1/3 of the customers formerly sold to by defendant (p. 203) and has a number of accounts and total sales almost equal to defendant. (Defendant's Exhibit 13 at p. 5) It is submitted that there is not as much as a colorable basis for finding that the court below had jurisdiction over this matter. Accordingly, the complaint should be dismissed.

## IV

## A STIPULATION IN A CONTRACT OF ADHESION THAT THE LAW OF A STATE WHOLLY UNRELATED TO THE EXECUTION AND PERFORMANCE OF THE CONTRACT SHALL GOVERN

WILL NOT BE GIVEN EFFECT WHERE TO DO SO WOULD SUBORDINATE THE PUBLIC POLICY OF THE STATE WHOSE LAW WOULD OTHERWISE APPLY

The Restatement (Second) of the Conflict of Laws (ALI 1969), provides at §187:

> "(2) The law of the State chosen by the parties to govern their contractual rights and duties will be applied even if the particular issue is one which the parties could not have resolved by explicit provision in their agreement directed to that issue, unless either (a) the chosen State has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen State would be contrary to a fundamental policy of a State which has a materially greater interest than the chosen State in the determination of the particular issue and which ... would be the State of applicable law in the absence of an effective choice of law by the parties."

Many courts have acknowledged the validity of the above general principle. In B. M. Heede, Inc. v. West India Machinery & Supply Co., 272 F. Supp. 236 (S.D.N.Y. 1967), the District Court stated the principle that parties may stipulate in contract the law to be applied in determining questions of validity, or at least closely related subjects, and interpretation where the law chosen has some reasonable relationship with the contract and the fundamental policy of the forum is not violated. Id. at 238. See New England Mutual Life Ins. Co. v. Olin, 114 F. 2d 131 (7th cir. 1940), cert. denied, 312 US 686 (1940); El Hoss Engineering & Transport Co., Ltd. v. American Independent Oil Co., 183 F. Supp. 394, 399 (S.D.N.Y. 1960) (stipulated law must have some

reasonable connection with the issues to be determined); Fricke v. Isbrandesten Co. Inc., 151 F. Supp. 465 (S.D.N.Y. 1957); Forney Industries, Inc. v. Andre, 246 F. Supp. 333 (D.N. Dak. 1965); cf. Massengale v. Transitron Elec. Corp., 385 F. 2d 83 (1st Cir. 1967) (applying the Restatement test).

Another principle which may militate against the recognition of choice-of-law provisions in contracts has been advocated by Justice Frank of the Second Circuit Court of Appeals, Prof. Albert Ehrenzweig, and the American Law Institute. In his cogent dissenting opinion in Siegleman v. Cunard White Star, Ltd., 221 F. 2d 189 (2nd Cir. 1955), Justice Frank called attention to the unfairness of choice-of-law provisions in "contracts of adhesion",

> "In such standardized or mass-production [take-it-or-leave-it] agreements, with one-sided control of its terms, when one party has no real bargaining power, the usual contract rules, based on the idea of 'freedom of contract,' cannot be applied rationally. For such a contract is 'sold not bought.' The one party dictates its provisions; the other has no more choice in fixing those terms than he has about the weather. Id. at 204.
>
> ....
>
> "An ordinary contract has been called a sort of private statute, mutually made by the parties in governing their relations. But in a take-it-or-leave-it contract, absent actual freedom of contract, the parties do not 'legislate' by mutual agreement; the dominant party 'legislates' for both." Id. at 205-06.

Prof. Ehrenzweig in his often-cited article on the effect of such overbearing contracts on the choice of laws (Contracts of Adhesion In the Conflict of Laws, 53 Column L. Rev. 1072 (1953)), concluded that "most

decisions upholding stipulations of other laws contain express references to the parties' equal standing." Id. at 1078. Ehrenzweig contends that the doctrine of non-enforceability of choice of law provisions in contracts of adhesion should apply, as it should in the case at bar, to standard form employment contracts containing post-employment covenants.

In Caruso v. Italian Line, 184 F. Supp. 862 (S.D.N.Y. 1960) the Court said, citing Ehrenzweig: "although a recital of the law governing the contract may be determinative in a proper case, it is here but one consideration in determining choice of law because its consensual nature is clearly fictitious." Id. at 863. (emphasis added).

The case at bar demonstrates, in almost model fashion, a take-it-or-leave-it contract of adhesion where the element of consent is "fictitious." Plaintiff's Vice-President testified that all salesmen signed the same contract; (p. 267) that it was a prerequisite to employment with the plaintiff Company (p. 267) that plaintiff's representative took no more than fifteen minutes to go over the entire contract with defendant and to answer any questions he might have; (p. 271) that defendant asked no questions regarding the contract; (p. 278) that before defendant signed the contract, he was, in fact, already approved for hiring; (p. 278) that defendant was not asked if he wished any changes in the contract (p. 279) that the plaintiff never, in fact, accepted a contract change for an individual salesman (p. 274) and had no authority to do so anyway. (p. 273-75) Moreover, plaintiff Corporation, with annual sales of $82,000,000 is clearly in a dominant bargaining position with espect to the imposition of contract terms upon prospective sales representatives.

In view of the above, it is suggested that the alleged agreement in issue is totally lacking freedom of choice on the part of the defendant. He had no choice as to its provisions; and he certainly could

not have understood the significance of the provision applying Texas law to disputes arising thereunder. Even assuming defendant read the choice of law clause, he would no doubt have signed it anyway since Texas law must have appeared as good or bad to him as any other. Clearly, the provisions selecting Texas law was devised solely for the convenience of the drafting party and its attorneys. Not considered by them was the public policy of the States in which these contracts were to be entered into and performed. While uniformity and predictability certainly are desirable motives, they must not be allowed to supersede the strong and overriding public policy of a State having the most significant and intimate interest in the validity and effect of the contract.

The Sales Representatives Agreement in issue was negotiated and executed by defendant in New York State. It should also be noted that defendant and his family are New York residents. Most significantly, the contract was to be fully performed within New York State. The only contact Texas law has with the alleged agreement is that the head office of the plaintiff, parent Corporation, which incidentally was not the place defendant visited when he was hired, is in Texas. Surely it cannot be denied that the "center of gravity," i.e., the State having the most significant interest in the validity of the alleged agreement, is New York State and not Texas. See generally 8 NY Jur. "Conflict of Laws" §17 (1959, cum supp. 1973) and cases cited therein. It is therefore submitted that notwithstanding the presence of a choice of law provision in the alleged agreement in issue, the parties have not made an effective and recognizable choice of law. In the absence of an effective choice of law by the parties, as New York is the forum State, New York choice of law rules must be applied in determining both whether the Texas law provision is valid and if not which law should apply. Klaxon Co. v. Stentor 313 US 487 (1941).

V

WHERE THE STATE HAVING THE MOST SIGNIFICANT CONTACTS WITH A CONTRACT HAS A STRONG PUBLIC POLICY WHICH IS MATERIALLY AFFECTED, THAT STATE'S LAW MUST GOVERN THE CONTRACT.

The "center of gravity" of the contract in issue undoubtedly lies in New York State. Defendant and his family reside in New York State; the territory assigned to defendant under the agreement was wholly within New York State; the contract was fully performable within New York State by defendant, and; the contract was executed by defendant at plaintiff's regional headquarters in New York City. Since New York has the most significant, and perhaps the only, contacts with the issues presented, New York public policy must be consulted in determining the legality of the burdens purportedly placed upon defendant's ability to earn a livelihood by the agreement. Rest. (2d) Conflict of Laws §§ 188, 202(2) (ALI 1969) (and cases cited therein); cf. Wyatt v. Fulrath, 16 NY 2d 169, 211 N.E. 2nd 637 (1965). It must therefore be determined: what is the public policy of New York State respecting post-employment covenants?

New York State has a keen and long established interest in the effect of restrictive employment covenants. In Purchasing Associates, Inc. v. Weitz, 13 NY 2d 267, 196 N.E. 2d 245 (1963) Judge, now Chief Judge Fuld reiterated that:

> "There are powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood, [and] the courts have generally employed a much stricter attitude with respect to covenants [not incident to the sale of a business] of this type."

Id. at 272, 196 N.E. 2d at 247.

> "It is contrary to the public policy of this State to enforce restrictive covenants in employment contracts unless special circumstances ... exist. Id. at 273 196 N. E. 2d at 248. See NY General Business Law §340; Paramount Pad Co. v. Baumrind, 4 NY 2d 393 151 NE 2d 609 (1958); Janitor Service Mgt. Co., Inc. v. Provo, 34 AD 2d 1098, 312 NYS 2d 580 (4th Dep't. 1970); Carpenter & Hughes v. DeJoseph, 13 AD 2d 611, 213 NYS 2d 860 (4th Dep't.), aff'd 10 NY 2d 925, 179 NE 2d 854 (1961); Rochelle v. Amendola, 11 AD 2d 786, 204 NYS 2d at 937 (2nd Dep't 1960).

In view of the strong public policy of the State of execution and performance in the situation at bar, should the stipulation that all aspects of the agreement be judged by Texas standards be enforced? What possible interest does the State of Texas have in restrictive effect of an employment covenant burdening a New York State citizen-resident? The answer to the above questions must be in the negative, for it is the State of New York that has a deep and well-founded concern for the financial well-being of its citizens and their families. Who will feed and clothe the defendant's children if he is estopped from carrying on his livelihood pursuant to this agreement -- not the State of Texas. Which State will bear the onus of unemployment compensation if the defendant is forced to seek public assistance in the event that he is unable to find other suitable employment? Which State's public policy against restricted competition will be offended because of the effect of agreements such as these? Surely by merely printing a form contract reciting the application of Texas law, the public policy of our State cannot be circumvented.

The conclusion, therefore, seems inescapable that the law and policy of New York State must be applied in determining the validity

of this agreement. Convenience and uniformity for the dominant party may not subordinate the well-being of New York residents and New York's strong public policy.

VI

AN INJUNCTION WILL NOT ISSUE TO ENFORCE POST-EMPLOYMENT COVENANTS WHERE THE FORMER EMPLOYEE'S SERVICES WERE NOT UNIQUE

In speaking of post-employment covenants not to compete, where they are not incident to the sale of a business, Chief Judge Fuld of the New York Court of Appeals said in Purchasing Associates, Inc. v. Weitz, supra:

> "A covenant by which an employee simply agrees, as a condition of his employment, not to compete with his employer after they have severed relations is not only subject to the overriding limitations of reasonableness but is enforced only to the extent necessary to prevent the employee's use or disclosure of his former employer's trade secrets, processes or formulae... . If, however, the employee's services are deemed 'special or extraordinary,' then the covenant may be enforced by injunctive relief, if 'reasonable' even though employment did not involve the possession of trade secrets or confidential customer lists...." Id. at 272,196 NE 2d at 248. See Carpenter and Hughes v. DeJoseph, 10 NY 2d 925 179 NE 2d 854, aff'g, 13 AD 2d 611, 213 NYS 2d 860 (4th Dep't 1961); Lynch v. Bailey, 300 NY 615, 90 NE 2d 484, aff'g, 275 AD 527, 90 NYS 2d 359 (1949).

It should be noted that in the case at bar the defendant did not possess any secret formulae, processes or trade secrets, he was just a salesman. In response to the argument that the names of customers that defendant had solicited over a period of some nine years with the

Company are the proper subject of protection, it is important to be aware of the fact that names of the customers that would be interested in plaintiff's product line are readily identifiable from a telephone directory. It is no secret, and requires no great experience to determine, who would be interested in floor cleaners, chewing gum removers, toilet cleaners, room deodorizers, and all other products in the plaintiff's product line. (p. 316)

In the case of Leo Silfen, Inc. v. Cream, 29 NY 2d 387, 328, 278 NE 2d 636 (1972), which differed from the case at bar only in that no written contract was there involved, the Court of Appeals reversed a decision of the lower court and dismissed the Complaint in a unanimous decision written by Judge Breitel. In that case the products involved were "chemical specialties" just as in the case at bar. There, as here, the potential customers names were readily obtainable in phonebooks as being interested in plaintiff's products. Taking cognizance of that factor, the Court refused to uphold the injunction restraining defendant from soliciting plaintiff's customers. See Boosing v. Dorman, 148 AD 824, 133 NYS 910, aff'd, 210 NY 529 (4th Dep't 1912); Tepfer & Sons v. Zschaler, 25 AD 2d 786, 787, 269 NYS 2d 555 (2nd Dep't 1966); Hudson Valley Propane Corp. v. Bryene, 24 AD 2d 908, 909, 264 NYS 2d 427 (3rd Dep't 1965). Even though the present case differs in the presence of an alleged agreement, the principal discussed above should control in denying injunctive relief. See Frederick Chusid & Co., v. Marshall Leeman & Co., 326 F. Supp. 1043 (S.D.N.Y. 1971). To hold otherwise would be to insulate plaintiff from the effects of ordinary competition which is surely contrary to New York public policy. See NY General Business Law §340; Paramount Pad Co. v. Baumrind, 4 NY 2d 393 (1958) (and cases cited therein.)

A recent New York case makes it clear that this State does not look with favor on agreements such as that involved in the present case. In Triple D & E, Inc. v. VanBuren, 72 Misc. 2d 569, 339 NYS 2d 821 (Sup. Ct. 1972), aff'd without op., 346 NYS 2d 737 (2nd Dep't 1973), the plaintiff corporation sold beverages, soft drinks, tobacco, etc. through what was termed contract-distributors. The prices, subject to unilateral change by the corporation, were determined by the corporation's "current price list." The distributors then sold these items in corporation-equipped vehicles at office buildings, construction sites, or wherever people were gathered. Although it was these drivers who sought out the customers, they were required to sign contracts which provided in part that they could not sell similar products within 500 or 5,000 feet from places they formerly served for one year after termination of their employment. The corporation sought an injunction to prevent two of its former drivers from competing with it allegedly in violation of the post-employment restriction.

In denying the requested injunction the court noted that:

> 'Once a contractor entered into an arrangement with the company he was left to his own devices and he prospered or failed as his efforts deserved. Of course the company invested time, effort and capital in the operation of its business and in acquiring routes and stops. Does that give it a proprietary right which should be enforced against the contractors? Anyone driving through the streets and thoroughfares of the County could discover places at which industrial trucks might sell their wares. 72 Misc.2d at 575, 339 NYS 2d at 828.

The court further went on to say:

> "Not every restraint of trade is a violation of Section 340 of the General Business Law. It

> offends that statute when it is unreasonable. We find that the restraint sought to be imposed by the agreement here was unreasonable and therefore violates that section." 72 Misc.2d at 577, 339 NYS 2d at 830.

It is submitted that the above case is entirely apposite to the present case and is controlling as a statement of New York law.

## VII

## A POST-EMPLOYMENT COVENANT THAT SERVES TO INSULATE THE EMPLOYER FROM ORDINARY COMPETITION IS UNENFORCEABLE IN NEW YORK STATE

The Appellate Division in Rochelle v. Amendola, 11 AD 2d 786, 204 NYS 2d 937 (2nd Dep't 1960) restated the principal that protection from ordinary competition is not a ground upon which to issue an injunction against a former employee.

> "The nature of the work done by defendant for plaintiff was not unique or extraordinary, nor did it involve any element of secret or valuable information concerning plaintiff's business. The injunction served only to protect plaintiff from ordinary competition, rather than to protect plaintiff's business against competition by improper and unfair methods. An injunction which has such an effect has been proscribed as against public policy despite defendant's negative covenant in the employment contract." Id. at 787, 204 NYS 2d at 938.

Paramount Pad Co. v. Baumrind, 4 NY 2d 393, 151 NE 2d 609 (1958); Interstate Tea Co. v. Alt, 271 NY 76, 2 NE 2d 51 (1936);

Clark Paper Mfg. Co. v. Stenacher, 236 NY 312, 140 NE 708 (1923); Murrary v. Cooper, 268 AD 411, 51 NYS 2d 935 (1st Dep't), aff'd 294 NY 658, 60 NE 2d 387 (1944); Heldman v. Douglas, 33 AD 2d 695, 306 NYS 2d 213 (2nd Dep't) appeal dismissed, 26 NY 2d 704, 257 NE 2d 49 (1969). To the same effect see Janitor Service Mgt. Co. Inc., v. Provo, 34 AD 2d 1098, 312 NYS 2d 580 (4th Dep't 1970), where the court denied enforcement of a contractual restrictive post-employment covenant that would prevent a supervisor of windowwashers from soliciting plaintiff's customers for two years in a twenty-five mile area.

Particularly appropriate is the language of a British Court quoted with approval in Clark Paper & Mfg. Co. v. Stenacher, supra.

> "But freedom from all competition per se... however lucrative it might be ... is not entitled to be protected against. He must [plaintiff] be prepared to encounter [competition] even at the hands of his former employee .... That doctrine does not mean that an employer can prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction." Id. at 320-21, 140 NE at 711.

## VIII

## THE PRESENT EMPLOYMENT AGREEMENT HAS ALREADY BEEN DECLARED UNREASONABLE

In National Chemsearch Corp. of New York, Inc. v. Bogatin, 349 F. 2d 363 (3rd cir. 1965) (per curiam), the identical employment contract in issue here was the subject of scrutiny by

three Judges of the Third Circuit Court of Appeals. The facts in that case were similar to the case at bar. Reversing the District Court's grant of an injunction restraining the defendant from competing with the plaintiff for a period of one year, the court said:

> "In the instant case the preliminary injunction must be vacated because in granting it for a period of one year the District Court exceeded the permissible limitations of its discretion. Bancroft & Sons Co., v. Shelly Knitting Mills, Inc., 268 F. 2d 569, 573 (3rd cir. 1959)." Id. at 364.

Later, in the case of National Chemsearch Corp. v. Weinberg, No. 68-CH-2698 (Circuit Court, Cook County, Ill., August 22, 1968) (unreported) the following conclusions were entered by Judge Cohen after a trial on the merits:

> "1. The restrictive covenants contained in the Sales Representative's agreement entered into on April 7, 1965, between plaintiff, NATIONAL CHEMSEARCH CORPORATION OF MISSOURI, and defendant, EDWARD WEINBERG are unreasonable.
>
> 2. The eighteen (18) month period of restriction imposed upon defendant EDWARD WEINBERG is excessive ...
>
> 3. The geographical scope of the covenant, namely all of Cook County, is excessive in that the evidence shows that defendant EDWARD WEINBERG serviced no more than two hundred (200) customers largely in a defined area within Cook County, whereas the covenant restricts the defendant EDWARD WEINBERG in the broader area of Cook County with potential customers of an excess of 90,000.
>
> 4. All of the restrictive covenants, therefore, must be declared unenforceable since they are not severable despite the provision in the agreement of April 7, 1965,

74-1201

ADDENDUM TO APPELLEE'S MEMORANDUM OF LAW

B

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USAchem, INC.,

Plaintiff-Appellant,

vs

Docket No.
74-1201

HOWARD A. GOLDSTEIN and
HOWARD A. GOLDSTEIN d/b/a
GOLD SEAL ASSOCIATES,

Defendant-Appellee.

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[Please insert the following paragraph immediately after the last paragraph of Point XII on page 41:]

The foregoing discussion assumes there is a factual question to be decided; however, even this may be foreclosed in view of the settled line of authority in New York which prohibits an employer from collecting the amount by which advances or draws exceed commissions upon termination. It has been repeatedly held under circumstances similar to the instant case, where there is no special agreement to repay drawings or their equivalent paid during a period of completed employment, that the employer may not recover such drawings. The Northwestern Mutual Life Ins. Co. v. Mooney, 108 N.Y. 118, 15 N.E. 303 (1888); Posner v. Precision Shapes, Inc., 271 A.D. 435, 65 N.Y.S. 2d 733 (1st Dep't 1946); Kleinfeld v. Roburn Agencies, Inc., 270 A.D. 509, 60 N.Y.S. 2d 485 (1st Dep't 1946); Carter v. Bradlee, 245 A.D. 49, 280 N.Y.S. 368 (1st Dep't 1935); Pease Piano Co. v. Taylor, 197 A.D. 468, 189 N.Y.S. 425 (1st Dep't), aff'd, 232 N.Y. 504, 134 N.E. 548 (1921); 36 N.Y. Jur. "Master And Servant" §47 at p. 468-70 n. 19 (1964).

74-1201 B

ADDENDUM TO APPELLEE'S MEMORANDUM OF LAW

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USAchem, INC.,

Plaintiff-Appellant,

Docket No. 74-1201

vs

HOWARD A. GOLDSTEIN and
HOWARD A. GOLDSTEIN d/b/a
GOLD SEAL ASSOCIATES,

Defendant-Appellee.

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[Please add the following to "Table of Citations" by inserting this page after p. vii:]

> which declares them severable and separately enforceable. Moreover, the eighteen month duration of the restriction applies to each restrictive covenant set forth in paragraph 4 of the agreement thus making each and every restrictive covenant unreasonable as to duration and unenforceable."

The above cases are, if not stare decisis, at least persuasive evidence that the present contract is unreasonable and unenforceable as written.

## IX

## A PROVISION IN AN EMPLOYEE PROFIT-SHARING PLAN PROVIDING THAT A PARTICIPANT WHO AT ANY TIME OR PLACE COMPETES WITH THE EMPLOYER WILL FORFEIT HIS OTHERWISE VESTED-INTEREST IN THE PLAN IS CONTRARY TO PUBLIC POLICY AND VOID WHERE ITS INTENT IS TO SUPPORT AN ILLEGAL POST-EMPLOYMENT AGREEMENT TO UNREASONABLY RESTRICT COMPETITION

As seen above (sections V-VII , supra), the provision in defendant's Sales Representatives Agreement purporting to prevent him from competing in his former assigned territory is contrary to the public policy of New York and unenforceable. It is submitted that a provision is an employee profit-sharing plan with an unlimited forfeiture provision specifically designed to prevent the same sort of ordinary competition sought to be proscribed by the illegal post-employment covenant is similarly contrary to the public policy of this State. Consequently, it is unenforceable as against an employee whose interest in the plan is otherwise vested.

The case of Kristt v. Whelan, 4 AD 2d 195, 164 NYS 2d 239 (1st Dep't 1957), aff'd without op., 5 NY 2d 807, 155 NE 2d 116 (1958), is often cited as controlling authority for the proposition that a forfeiture provision in a non-contributory profit-sharing or pension plan providing forfeiture of an employee's interest should he compete with his employer is not against public policy and in restraint of competition. In that case a deed of trust was made by the employer to a trustee for the benefit of employees. The trust contained the following provision:

> "If any beneficiary at any time while he is entitled to (1) any payment from the Trust, or (2) to his share in the Trust, and whether he shall then be in the employ of the company or not, shall engage or be employed in any occupation or business which is in competition with the Company in any of the publishing fields then engaged in by the Company, the Trustees shall upon request in writing by the employer, cause the entire interest of such beneficiary to be forfeited, and upon such forfeiture, the beneficiary shall have no right thereto." 4 AD 2d at 197, 164 NYS 2d at 241.

In reversing the judgment below in favor of the employee, the court utilized the following rationale:

> "It is no unreasonable restriction to the liberty of a man to earn his living if he may be relieved of the restrictions by forfeiting a contract right or by adhering to the provisions of his contract. The provision for forfeiture here involved did not bar plaintiff from other employment. He had the choice of preserving his rights under the trust by refraining from competition with [his employer] or risking forfeiture of such rights by exercising his [rights] to compete with [his employer]." 4AD 2d at 199, 164 NYS 2d at 243. (citations omitted and emphasis added).

Subsequent New York cases to the same effect rely on the rationale of the Kristt case. Kerpen v. First Investors Corp., 45 Misc

2d 793, 257 NYS 2d 880 (Sup. Ct. 1965); Kidd . v. Oakes, 39 Misc. 2d 645, 241 NYS 2d 403 (1st Dep't, App. T. 1963); Matter of Kumm, 36 Misc. 2d 816, 233 NYS 2d 598 (Sup. Ct. 1962). As an added insight into the court's holding in Kristt, it is interesting to note that defendant-employer's brief in the Court of Appeals emphasized that "plaintiff [employee] after terminating his employment with Haire [employer], went into open and direct competition with it without molestation or interference of any kind and with no right on the part of Haire, even if it had wished to do so, to restrain and enjoin such competition." Kristt v. Whelan, Defendant's Brief in Court of Appeals at 28-29.

For its holding the the Kristt case that the forfeiture was not against public policy and in restraint of competition, the court cited, inter alia, Simons v. Fried, 302 NY 323, 98 NE 2d 456 (1951). The Simons case involved a close corporation with three shareholders who entered into an agreement among themselves that so long as they remained shareholders of the company, they would not become interested in a competing business. If any of the signatories should become so involved in a competing business, the others would have a right to obtain an injunction to restrain such a breach. One of the signatories did become so involved in a competing business and an injunction was sought to restrain the violation which was granted. In upholding the injunction, the Court of Appeals said:

> "The contract in suit permits a sale by the Frieds [competitors] of their stock in the Simons Furniture Company provided they first offer to sell that stock to Alexander Simons who, if he elects to buy it, must pay a price to be fixed in accordance with a stipulated method of valuation. Thus the Frieds have only to dispose of their Simons Company stock in accordance with the contract and they will be wholly free to engage or invest in any lawful business anywhere.

> The Frieds are not wanting in understanding. No fraud or imposition was practiced upon them by Alexander Simons. The contract in question was carefully drawn. We find therein no element of unfairness. The Frieds ought to be held to their bargain." 302 NY at 326, 98 NE 2d at 457.

New York case law in point therefore directly supports forfeiture provisions only where (1) The employee may be relieved of the anti-competitive restriction by simply giving up his rights in the pension or profit-sharing plan in exchange for his unfettered right to compete with his former employer and/or (2)There exists in the agreement an equal standing, fairness and sense of bargain between the parties. It is submitted that the above elements are totally lacking in the case at bar and, for that reason, the above-cited New York cases are inapposite.

This case differs because defendant employee could not be relieved of the purported restriction in section 12.3 of the profit sharing simply by giving up whatever rights he may have had in that plan in exchange for a right to compete with his former employer. There was, in addition to this forfeiture provision, a restrictive covenant in his Sales Representatives Agreement which purported to prevent him from competing with his employer. The provision in the profit-sharing plan was specifically designed to discourage employees from violating the covenants in the employment contract which itself is contrary to public policy. On direct examination plaintiff's treasurer testified:

> "Q: Why did the Company adopt the Profit-Sharing Plan?
>
> "A: The purpose of the Profit-Sharing Plan or Plan such as this is to instill loyalty and long-term service from its employees.
>
> "Q: Is there a provision in the plan which would forfeit an employee's interest if he is not loyal to the Company?

"A: Yes, there is. [witness reads §12.3 of Plan dealing with forfeitures in the event of competition].

"Q: Is that provision in the contract to discourage persons from competing with the Company in violation of their contract?

"A: Yes." (p. 115-18). See p. 126-27.

It is submitted that the restrictive post-employment covenant together with the forfeiture provision in the profit-sharing plan, and each of them, tend to restrict competition in violation of the public policy of this State as established by New York courts (sections V-VII supra) and by statutes. N. Y. General Business Law §340. Not only would such a holding be consonant with New York public policy, but it would be in accord with holdings of the highest courts of other states. Muggil v. Reuben H. Donnelly Corp., 62 Cal. 2d 239, 398 P. 2d 147 (1965); Flammer v. Patton, 245 So. 2d 845 (Fla. 1971); Van Hosen v. Bankers Trust Co., 200 N. W. 2d 504 (Ia. 1972); Food Fair Stores, Inc. v. Greely, 285 A. 2d 632 (Md. 1972); Est. of Schroeder v. Gateway Transp. Co., 191 N. W. 2d 860 (Wisc. 1971).

In Van Hosen, supra, a former employee brought a declaratory judgment action against his former employer to establish his right to a pension. The pension plan provided that if an employee became involved with a competitor to the employer, his rights thereunder would be forfeited. The court held that the divesiture provision imposed an unjust burden on the employee and was therefore unenforceable as a violation of public policy.

"In absence of a statute declaring void any such in terrorem provisions ..., and we have none, the enforceability of a contractual divestiture is usually determined by the application of the public policy or reasonableness standard."

....

> ...[T]he infinite forfeiture and termination of all pension rights instantly acquired by plaintiff through prior affiliation with defendant bank [employer], merely by accepting employment with a competing institution, imposes an unjust and uncivic penalty on plaintiff at the same time disproportionately benefiting these defendants." 200 N. W. 2d at 508-09.

As Iowa, New York has no statute specifically dealing with such forfeiture provisions; it does, however have a strong public policy against contracts in restraint of trade.

Certainly it cannot be gainsaid that the promise by the corporation in this case to pay Goldstein a benefit in the form of a profit-sharing plan should he continue in its employ for a fixed period of time did not ripen into a contract by Goldstein's continuing in the corporation's employ for the requisite time, thereby accepting the corporation's offer. 1-A. Corbin, Contracts §153 (1963); 1 S. Williston, Law of Contracts § 130B (Jaeger ed. 1957). To say that the plan was a mere gratuity that the employer could withdraw on whim ignores existing economic conditions where a person accepting employment evaluates both take-home pay and fringe benefits. (p. 215) Such plans containing forfeiture provisions, cloaked in the guise of "gratuitous" benefit plans, must not be permitted to thwart public policy.

## X

## THE TRUSTEE OF THE INSTANT PROFIT-SHARING PLAN AND THE ADMINISTRATIVE COMMITTEE THEREOF ARE NOT INDISPENSABLE PARTIES TO THIS PROCEEDING

Although no objection was ever made to defendant's counterclaim on the grounds of non-joinder of an indispensable party, it might be anticipated that such an objection would be raised for the first time on appeal. FRCP 12(h)(2). Under FRCP 19 the indispensability of a party not joined in an action is a federal question. Provident Tradesmans Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). It is submitted that where (1) all contributions to the plan are made by the employer (2) who appoints all members of the decision-making committee, (3) which, in turn, is comprised solely of employees, agents or other people otherwise under direct control of the employer and (4) all forfeitures thereunder go back into the plan for the benefit of the remaining employees, joinder of the individual members of the decision making body and the holder of the fund, is not necessary under FRCP 19. Furthermore, the corporation, the members of the profit-sharing plan administrative committee and the fund holder have a unity of interest which is adequately represented in this suit by the instant plaintiff. Under such circumstances, joinder is not necessary where the trustee of the plan is a mere stakeholder by function (Salem Trust Co. v. Manufacturer's Fin. Co., 264 US 182 (1924)) whose interest is adequately represented. See 3A J. Moore's, Federal Practice ¶19.08 at 2294 (1967). A dismissal of defendant's counterclaim under FRCP 12(h)(2) at this stage of the proceeding, after issue has been joined without objection and after trial, would not be in accord with the policy of the Federal Rules.

## XI

## AN ADEQUATE SHOWING OF A DANGER OF IRREPARABLE INJURY IS A PREREQUISITE TO THE GRANTING OF INJUNCTIVE RELIEF, THE DENIAL OF WHICH IS REVIEWABLE ONLY FOR ABUSE OF DISCRETION

The traditional basis for the issuance of an injunction is a finding of irreparable harm and inadequacy of legal remedies. Beacon Theatres, Inc. v. Westover 359 US 500, 506-07 (1959); 4 Pomeroy, Equity Jurisprudence §1338 (1941). In the absence of such a finding, the injunction will not issue. E.g., Caddy - Imler Creations, Inc. v. Caddy 299 F. 2d 79 (9th Cir. 1962). It is settled law that the issuance of an injunction is an equitable remedy which rests in the sound discretion of the Court, and is reviewable only for abuse of discretion; the cases in support of this are legion. 5A CJS "Appeal and Error" §1591 (1958), and cases cited therein.

After the issue of damages was submitted to the jury and they returned a verdict of "no damages," the court below ruled as follows:

> "The jury found that the plaintiff had not sustained damages by loss of profits due to sales made by Goldstein within his contract territory. Based upon that finding by the jury, I find that there is no reasonable probability that the plaintiff will sustain damages during a period of eighteen months following the entry of this judgment. I find that there is no reasonable probability that the defendant will in the future divulge to others or use for his own benefit any confidential information acquired during the course of his employment relating to sales, processes or formulas." Decision at 1-2 (Jan 10, 1974).

Surely after the jury found no damages the judge could properly conclude, and did conclude that there was no showing of irreparable harm. Furthermore, implicit in his decision was that there were no trade secrets, secret processes, patent information or confidential sales data to be protected by the use of the drastic remedy of a permanent injunction. This analysis, assumes of course, that the Court properly ruled the purported restrictive covenant was not void

as contrary to public policy; if it were void, as it is respectfully urged, no injunction could lawfully issue thereon in any event. Nonetheless, it cannot be said that in refusing to issue the injunction prayed for by plaintiff, the court was guilty of an abuse of discretion.

## XII

### THE COURT BELOW ERRED IN GIVING A JUDGMENT AS A MATTER OF LAW TO PLAINTIFF FOR THE AMOUNT BY WHICH DEFENDANT'S ADVANCES EXCEEDED COMMISSIONS

The Sales Representatives Agreement (Plaintiff's Exhibit 1) makes the following reference only to so-called "advances":

> "Company may periodically advance to representative against commissions earned and commissions to be earned amounts established by the Company from time to time".

The significance of the term "advance" is never explained beyond its being a mere bookkeeping entry. Plaintiff's treasurer on direct examination never says that excess advances have to be paid back. (p. 43-46). Plaintiff's Vice-President concedes that there was never a formal demand made upon Goldstein to return excess advances at the time he terminated. (p. 312) In fact, on redirect the same witness concedes that no demand of any kind was ever made on Goldstein. (p. 332) Goldstein's own testimony at trial fully supports this. (p. 352, 359-60) There was however testimony that alluded to an accord reached between plaintiff's Vice-President and Goldstein with respect to excess advances on termination.

"Q: Did you ever ask Mr. Goldstein to pay back the debit which he owed in August of 1972?

"A: Not directly, no.

"Q: Did you and he have a conversation?

"A: Yes.

... (colloquy)

"A: I told him that I had been sending him draw checks for three months; that he had been telling me that he was going to go back to work and I felt it had been unfair for him to take (colloquy) ... to receive draw checks two weeks after the meeting and not going back to work and then terminate, and he said to me that he would return two draw checks if I felt that way about it.

"Q: Did he ever return them?

"A: Yes, sir. (p. 332-35)

It is also important to note that on at least one occasion when Goldstein was ill for three months in 1970 and kept receiving weekly checks from the Company, he was told not to worry about paying the money back. (p. 358-60)

When the meaning of a contract is ambiguous as to a particular provision the construction of it is a question of fact for the jury. Martin v. Crumb, 216 NY 500, 505, 111 NE 62 (1916); National Utility Service, Inc. v. Thatcher Glass Mfg. Co., 30 AD 2d 168, 290 N.Y.S. 2d 1002 (1st Dep't 1968). It is posited that the vague and brief reference to advances in the Agreement without mention that such amounts have to be repaid in certain circumstances, together with the maxim that a contract is construed most strongly against the drafting party, Evelyn Bldg., Corp. v. New York, 257 N.Y. 501, 178 N.E. 771 (1931), creates an ambiguity on

the instant issue that should have been resolved by the trier of fact. Furthermore, in the absence of a provision in an agreement prohibiting oral modification, a written agreement may be modified by a course of conduct between the parties. Walker v. Millard, 29 N.Y. 375 (1896); 10 NY Jur. "Contracts" §404 at 415 (1960). This, too, should have been submitted to the jury. Notwithstanding the testimony to the contrary and the ambiguities in the Agreement, the Court decided, as a matter of law, that Goldstein had to repay the so-called debit balance to the plaintiff, which it is submitted, was error.

## CONCLUSION

For the foregoing reasons defendant Howard Goldstein prays that the within action be dismissed for want of jurisdiction; that the judgment below be reversed insofar as it dismissed defendant's counterclaim for his interest in his profit-sharing; reversed insofar as it granted judgment in favor of plaintiff against defendant in the amount of $3,386.00 with costs and interest, and; affirmed insofar as it denied plaintiff's request for an injunction against defendant.

Respectfully submitted,

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